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Total Strangers or Soul Mates?

Antidumping and Competition Policies in Latin America and the Caribbean

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As Latin American and Caribbean countries have liberalized their trade regimes, they have enthusiastically adopted antidumping measures that reduce competition. Competition laws are only beginning to make their appearance in the region. Antidumping and competition policies are strangers in the region when they should be soul mates.

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Summary findings

As a result of trade reforms in the 1980s and 1990s Latin American and Caribbean countries became more open than at any time since World War II. However, these countries have recently begun to use antidumping measures as the new protection weapon of choice, as other barriers to trade have been reduced. In fact, the fastest growing antidumping actions are within regional integration arrangements, where they are being applied by member countries against each other.

Guasch and Rajapatirana argue that antidumping is anticompetitive and that its usual justification as a counter to predatory behavior is not relevant in the region. It is imperative, they say, that antidumping be

contained if not altogether eliminated. While they find that safeguards are less anticompetitive than antidumping, they believe that all exceptional protection measures, such as antidumping, countervailing, and safeguards, should be considered together with competition policies. In other words, they should become soul mates rather than remain total strangers.

Guasch and Rajapatirana do not find that fine-tuning antidumping policy is a good option. Rather, they believe that both trade and competition policymaking ought to be brought under a single entity, as in Peru. This would lead to a more competitive solution.

This paper — a product of the Finance, Private Sector, and Infrastructure Group, Latin America and the Caribbean Region — is part of a larger effort in the department to. Copies of the paper are available free from the World Bank, 1818 H Street NW, Washington, DC 20433. Please contact Joy Troncoso, room I5-059, telephone 202-473-7826, fax 202-522-2106, Internet address jtroncoso@worldbank.org. The authors may be contacted at jguasch@worldbank.org or srajapatirana@worldbank.org, August 1998. (26 pages)

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Antidumping and Competition Policies in Latin America and Caribbean: Total Strangers or Soul Mates?

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Antidumping and Competition Policy in Latin America and Caribbean: Total Strangers or Soul Mates?

I. Introduction

Trade policy regimes in Latin America have been transformed since the mid 1980s, from inward oriented protectionist regimes to more outward oriented and liberal trade regimes. The extent of the transformation is seen in the reduced level of overall protection, much reduced use of quantitative restrictions compared to the past and no recourse to exchange controls in current account transactions. While the liberalization agenda is by no means complete, it is fair to say that the transformation of the trade regimes has been remarkable. Nor have the recent shocks following the Mexican peso crisis 1994 lead to reversals of the liberalized trade regimes on a wide scale, as would have been the case in the past.¹ There were few and relatively small reversals. Brazil raised a few tariffs, Argentina temporarily re-introduced the "statistical tax" and the Andean group's use of price bands kept domestic prices high despite a fall in world prices.

Objective indicators, such as the average tariffs, coverage of quantitative restrictions, and the openness ratio all show that Latin America is more open than any time in the post World War II period. Moreover, exports and imports have responded to trade liberalizations (see Table 1). Nevertheless, there is a need for a continuing agenda for reform in the region to sustain and further the earlier gains. Part of that agenda is the adoption of competition policies, and consistent with them, the reform of some aspects of trade policies, particularly of the antidumping practices. Both are of fundamental importance. Well designed trade (including foreign investment) and competition policies, support, complement and reinforce each other, facilitating market discipline and competitive behavior by firms, domestic and foreign. From a normative standpoint, trade and competition policy share the common economic objective of attempting to remove barriers to the competitive process and thus ensuring market access and presence, promoting efficiency. But, in practice, however, when other objectives are introduced

¹ Braga, Carlos Primo, Julio Nogues and Sarath Rajapatirana "Latin America and the Caribbean in the World Economy," Proceedings of the Annual Conference on Development in Latin America 1995, Rio de Janeiro, June 12-13, World Bank Latin American and Caribbean Studies, World Bank 1995.

from pressures from interest groups, there could be considerable friction in the trade, and competition policy nexus. Thus the need for a coherent design, coordination if not integration and strict oversight, to avoid capture and distortions. This paper argues that there are good reasons to worry about the antidumping law and practice and that antidumping per se should be, if not eradicated, transferred to the jurisdiction of the competition policies agency and judged and ruled by the same economic criteria.

The plan of the paper is as follows. The next section II, discusses generic issues related to antidumping and competition policies and the background to the discussion that follows. Section III describes antidumping in the Uruguay Round. Section IV examines antidumping practice in Latin America. Section V examines competition policies in Latin America. Section VI provides conclusions regarding the integration of antidumping and competition policies.

Table 1: Changes in Trade Orientation (percent)

Country	Trade reform period	Openness index		Trade flows		
		Period	Change	Period	Export growth	Import growth
Argentina	1989-91	1988-94	8.01	1990-94	5.63	31.62
Bolivia	1985-88	1984-93	3.56	1986-93	8.46	4.76
Brazil	1990-93	1989-94	5.19	1991-94	6.99	9.97
Chile	1988-91	1987-94	4.17	1989-94	10.42	12.75
Colombia	1989-91	1988-94	5.93	1990-94	10.87	18.29
Mexico	1987-89	1986-94	6.16	1988-94	4.10	19.06
Peru	1990-92	1989-93	6.98	1991-93	4.21	8.23
Uruguay	1987-92	1986-94	6.14	1988-94	7.93	12.83
Venezuela	1989-91	1988-94	1.69	1990-93	7.15	6.26

Note: The change in the openness index is measured as the average of the changes in the ratio between the year prior to the initiation of the liberalization episode and 1994. The change in export and import growth is measured as the average of the changes between the year following the initiation of the liberalization episode and 1994.

Source: World Bank data.

II. Generic Issues and Background

The term competition policy encompasses the area commonly known as anti-trust or anti-monopoly law and practice, as well as micro industrial policies affecting markets and governing business practices. Competition laws strive to deter and prevent abuses of market power, dominance, exclusionary practices, and the reaching of agreements to limit competition and to provide guidance on mergers and acquisition practices. The core objective of competition policies is to preserve and protect the process of competition and not competitors, to maximize economic efficiency (allocative, distributive and dynamic), reflected in efficient prices, better quality products and innovation. Competition policy focuses on the rules of the game over the behavior and actions by market participants, and as such, it tends to be neutral in design as opposed to pro-active. Through its deterrent effects, when the legislation is effectively enforced, increases in competition, market discipline and a competitive environment can be secured.

Trade policies have traditionally focused on facilitating access to markets, through reduction of tariffs, and quantitative restrictions and elimination of barriers to direct foreign investment, so as to increase output, efficiency and competition and to realize the associated benefits, while at the same time maintaining some level of protection for the domestic industries. The arguments supporting protective components have been varied, but most often they have been based on the need or desire to shelter, presumably temporarily, incipient domestic industries from more advanced and efficient cost-quality foreign competitors, or they are based on pressures from politically influential interest groups, or on distributional grounds. Aside from the infant industry type, the present economic arguments for protection are usually based on the externalities generated by some sectors, particularly on the diffusion of technology and know-how.

In practice, trade policy tends to be more pro-active, in that it can involve subsidies of one form or another, overt or hidden, that target or favor some domestic sectors or regions and erect barriers to foreign competition (through tariffs or non-tariff instruments). As a result, trade policy can either significantly promote or substantially impede the economic goals of competition policy.

There is a natural affinity and opportunity for convergence between trade and competition policies. Trade policies include not only border measures such as import tariffs, export duties and quantitative restrictions, but non-border measures as well. For example, during the Tokyo Round, specification of technical standards, government procurement, and domestic subsidies were included in the negotiations. The Uruguay Round included intellectual property rights, trade related investment measures, and services. Free trade and foreign direct investment can be a most powerful competition inducing instrument/policy. Import competition is essential where high natural or strategic entry barriers have allowed a few firms to attain and abuse a dominant position. Competition from imports is an effective way of curbing the exercise of market power, particularly when production technology calls for scales typical of natural monopoly, or when one, or a few, dominant local producers are entrenched or protected by high entry barriers (e.g., scale, sunk costs, technology). To be most effective as competition devices imports should be free from all restrictions other than a moderate tariff. Non-tariff barriers should be removed and import procedures should be transparent and not subject to discretionary changes.

The distinction between competition policies and trade policies has become somewhat blurred. Moreover, many of the trade policy instruments are designed to deter anti-competitive practices by foreign firms, the same objective of competition policies, but usually focused on domestic firms. For example, if and when properly used, antidumping measures counter predatory pricing and price discrimination and countervailing duties counter subsidies as well as overall unfair competition. Competition policies also aim to deter those practices by domestic firms. The growing extraterritorial application of competition policy further blurs the jurisdiction and distinction between trade and competition policies. The proper extension of the latter could and should bring into question the conceptual need for some of those trade policy instruments. All of this argues from a normative standpoint for a consistency and at least coordination if not integration between competition policies and trade policies. From the positive standpoint, when characterizing the relationship between trade (antidumping) and competition policies, we can think of two modes. They are soul mates when both policies and agencies are perfectly coordinated, consistent with each other if not fully integrated; or total strangers when they

literally work on separate ways, separate jurisdictions and there is little interaction between both agencies responsible for enforcing their respective legislation. We argue here that while they should be more like soul mates, they have not even been rival siblings but behaved as total strangers.

We have increasingly seen divergences and inconsistencies between trade and competition policies, particularly in reference to antidumping practices and in the lukewarm interest in the enactment and enforcement of competition policies. Antidumping has come to serve as the new instrument of choice for protection and to undo the benefits of trade reforms, as other trade barriers are reduced. Competition policies could and should serve as the antidote to the common use of antidumping to reduce external competition in particular industries. They are the appropriate instrument to curb the spread of antidumping and the only means available to the international community to act as a brake against the wide use and the inevitable abuse of antidumping.

Dumping is said to occur when an export price of a good is below the exporter's home market price, or if the home market price cannot be determined, when export price is below the export price in a third market, or lower than the cost of production in the exporting country. It is this third kind of test that has become the more common method of defining dumping. The difference in the price and cost must cause "material injury" for antidumping duty to be imposed. GATT/WTO rules allow the imposition of antidumping duties when there is both dumping and injury. But the definition of dumping in GATT/WTO rules and industrial countries practice does not make much economic sense. Injury is difficult to show, since in the national welfare sense, there is no injury, but a loss of profits to producers in the importing country, who may have lost their comparative advantage to produce the good, if they ever had it. As protection is removed, the production structure may be responding to the newly created incentives and becoming more efficient. Given the lax manner this law is administered, it is no wonder that antidumping has become the favorite choice of protectionists, where a ready-made instrument is available to limit foreign competition. Other instruments such as safeguards, which allow for the adjustment of domestic industry to either temporary increases in imports or to give time for a permanent shift of

the affected industry are rarely used, if at all. In this respect too Latin America has followed the industrial country model, for very good reasons, described below.

Many analysts have observed the pattern of adoption of antidumping as a protective and anti-competitive instrument, as tariffs and quota restrictions (QRs) were reduced in industrial countries. In this sense, Latin American countries have begun to imitate the pattern of the industrial countries as other more explicit barriers to trade are being reduced and have become keen, adept, and enthusiastic students of antidumping practice. The adoption of antidumping policies in the region can be attributed to the increased external competition arising from the unilateral trade liberalizations, multilateral trade liberalizations in the context of the Uruguay Round, and as many Latin American countries joined GATT in the last decade and adopted its rules. Bolivia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Paraguay, and Venezuela joined GATT during the past decade and a half. Argentina, Brazil, Chile, Colombia, Peru, and Uruguay had joined earlier but adopted GATT antidumping safeguards and subsidy rules only much later, in the early 1990s. The paper finds that there has been a large increase in antidumping actions in Latin America in the 1990s, following strong trade liberalizations. This instrument has now become available to protectionist interests that had been more restrained during the strong liberalizations and is sanctioned by GATT/WTO rules. Ironically, the adoption of international rules of conduct with the joining of GATT/WTO has provided both the weapon and the opportunity to indulge in protectionist policies within these rules.

Because antidumping policies are in practice anticompetitive, they detract from national welfare. The original intent of antidumping rules to prevent predation has lost its purpose.² Modern trade policy research or economic theory finds little justification for an antidumping law, since if one party were to drive out a home country producer through dumping, then that market would be profitable for other foreign producers to enter and compete away the monopoly profits that allegedly were intended to be created. In such cases, there are no incentives or payoff to predate. The losses due to selling below marginal costs have to be recouped in excess profits plus

² The US Antidumping Duty Act of 1916 was clearly based on the intent of preventing predation. However, very few cases were brought under the act given the difficulty of proving predation and injury. The celebrated and more recent case under the act was the Zenith vs. Matsushita decision of 1986, wherein the Supreme Court held in the favor of defendants who were accused of dumping TV sets in the US market.

an inadequate rate of return for the period when the losses takes place. But open trade regimes make those markets contestable, so there is little opportunity to capture monopoly rents. With open trade regimes, such as those in Latin America now, there is little justification for the use of antidumping.

Competition policies aim to promote and protect competition and economic efficiency, rather than competitors. Market power is dependent on the relative size and structure of the market (e.g., number of competitors, ease of entry, contestability extent, trade barriers, and availability of present or potential substitutes). Dominance is based upon the absolute size of the producing firm, its links to inputs and other output producing industries, and its influence in and by the international market.

Competition policy is executed through the legal system, and works through its proper and predictable enforcement-deterrence effects. Competition laws essentially address two areas: the conduct of business and the structure of economic markets. Issues of performance are embedded directly or indirectly in those two areas. In the event of transgressions, producers are subject to criminal and civil prosecution, fines, or injunctions. Competition policy prohibits conduct that either unfairly diminishes trade, reduces competition, unfairly injures competitors and consumers, or abuses a market-dominating position. The laws are intended to provide horizontal and vertical restraints as well as establish enforcement standards.

A second aspect of competition policy refers to structural policies. These have become the fastest growing means of pursuing anti-trust aims. Competition laws influence market structure by affecting intercorporate transactions (contractual or ownership relationships among suppliers or competitors), usually mergers, takeovers, joint ventures, and asset transfers. They aim to prevent transactions that would reduce the independence of competing suppliers (vertical integration) and increase concentration in market (horizontal integration). They are attempted through merger control regulation, pre-merger notification, and enforcement and remedial measures under merger control. A third aspect of competition policy is concerned with performance policies. That lead to the adoption of administrative pricing by anti-trust authority to make up for lack of competition by dictating prices or output.

Notice that competition policies can and has jurisdiction to address predation, unfair price discrimination, and abuse of dominant position issues which are the core of antidumping request. This argues then, along with the stated economic questionability of antidumping practices for the need to eliminate antidumping agencies and to transfer that jurisdiction to the competition agencies, or at least for a close coordination. A stronger argument to eliminate antidumping practices altogether can be made on the basis of the lack of economic merits to punish predatory behavior, if indeed there is such a thing in its purest interpretation. This has been the approach taken by the European Union within its borders. While many competition legislation do have clauses addressing predatory practices, they are seldom invoked, and very few cases make it through the process, and are affirmed for the reasons previously exposed. Today, with the new regime of open trade, predatory practices, have little economic merit and are indeed an anachronism. Thus the argument for its disposal.

The correct way to address dumping if it were to occur is to integrate trade (antidumping) and competition policies giving jurisdiction to the Antitrust agency to monitor the prices charged by the firm domestically and in foreign markets. Whenever the domestic price is higher (net of levies) than that charged in a foreign market, the agency should consider investigating and opening a case against the firm for potential domestic anticompetitive practices that allow a higher domestic price. Then it is the home country the one that should levy a penalty against the firm, for charging higher prices domestically and not the foreign country, for charging lower prices there.

III. Antidumping in the Uruguay Round

As indicated above, many Latin American countries joined GATT and adopted GATT/WTO rules in the last decade and a half. Other countries had already been GATT members rededicated their commitment to GATT/WTO rules, to which they had adhered only incompletely, invoking various exemptions and “special and differential treatment” or contributing to some and not all the rules and codes established during the various multilateral negotiating rounds.

The Uruguay Round negotiations led to an agreement where membership had to be complete, in the sense that member countries could not subscribe to some rules and not to others. As the Latin American countries joined up, they now subscribe to all the codes and rules including antidumping, subsidies and countervailing duty and safeguards.

Where antidumping was concerned, the Uruguay Round introduced few procedural changes that refined the circumstances under which antidumping investigations can be undertaken, the method of calculating the antidumping duties and procedures.³ The new rules indicate that the profits, selling costs and administrative should be based on actual data and when such data is not available, to use of data from other exporters of similar products. A weighted average of the costs and profits of these exporters can be used. Also any other reasonable method could be used as long as it does not exceed costs and profits of other exporters or producers of the same general category of products. Despite this refinement, importing countries have much latitude to construct values and to find differences in export prices and domestic costs.

Second, the Uruguay Round agreement provides guidance to averaging the cost when a good is sold at different prices over different periods. The earlier provision led to a bias such as to overstate the domestic costs and led to a difference between domestic cost in the exporting country and export price. The new provision allows the use of a weighted average normal value in the home market with the weighted average of all comparable exports or on a transaction to transaction basis.

Third, the Round also provides guidance to estimating costs to avoid the differences in export and domestic prices arising from high start up costs. Cost calculations have to take into account the inherent upward bias in the home market arising from the high start up costs and their spread over time.

Fourth, earlier cost estimates could ignore domestic sales below costs of production, leading to a gap between the constructed domestic costs and export price and to a consequent antidumping margin. The new rules postulate that domestic sales below the average cannot be

³ Schott, Jeffrey J., The Uruguay Round: An Assessment. Institute of International Economics, 1994.

ignored if they constitute more than 20% of total sales. As a result, the average costs would be lower and therefore the antidumping margin would disappear or be made smaller.

Fifth, when exporters from more than one country are involved in an antidumping investigation, the Round allows the home country to take into account the cumulative effect of the injury. Cumulation is allowed if each exporter's share exceeds more than 3% of the importing country market, the *de minimis* condition for starting an inquiry. It also allows the start of an inquiry when the total share of all the exporters is above 7% of the domestic market. Other *de minimis* rules apply to the margin between cost of production and export price, if it is below 2% the antidumping inquiry is halted.⁴

Finally, the Round promulgated a sunset provision. Under the new rules, both antidumping and price undertakings (in lieu of antidumping) automatically expire after five years, unless a review finds that the "injury" continues to occur. Another provision is that antidumping investigations must be supported by at least 25% of domestic producers.

Despite the above refinements, antidumping continues to be of concern. In some respects, the new rules are more permissive. In particular, the Uruguay Round agreement watered down the dispute settlement with respect to antidumping by promulgating that WTO panels reviewing antidumping cases must be limited to whether the national authorities properly established the facts and whether their evaluation was non-biased and objective. If the national authorities adopted a permissible interpretation, the WTO panel must uphold it even though the panel concludes that a different interpretation is preferable.⁵ The new rules in effect codify US and EU practices that have led to increased antidumping actions. Moreover, the refinements do not reduce appreciably the attractiveness of antidumping remedies for protection purposes compared to safeguards. The latter are in national welfare terms—the preferred instrument to deal with imports that threaten injury to domestic industry.

⁴ This is less stringent than the current US practice, which is a *de minimus* margin of 0.5%.

⁵ Abbot, Kenneth W. "Trade Remedies and Legal Remedies: Antidumping, Safeguards, and Dispute Settlement After the Uruguay Round." Northwestern University School of Law, Chicago, 1995 (mimeo).

IV. Antidumping Practice in Latin America

Antidumping activity has increased significantly in the recent decade across the world and also in Latin America. GATT records show that during 1985-92 there were 1,148 antidumping cases, an average of over 150 cases per year, while there were no more than 12 case per year from 1947-68. Between 1985 and 1992, the United States brought some 300 cases, Australia 282 cases, the European Union 242, Canada 129 cases, Mexico 84, and Brazil 13. The concern is that these measures have become protectionist devices. The increase is associated with the liberalization of the trade regimes. Moreover, with the appreciations of exchange rates particularly with countries that adopted nominal anchor strategies, antidumping was an appealing weapon to reduce external competition in "sensitive" sectors and to help with the increased current account deficits that resulted from external shocks.⁶ The incidence of antidumping actions are shown in Table 2. From 1988 through 1994, Argentina led the way in Latin America during that period with 135 petitions alleging dumping or subsidizations of imports⁷. Of these, 50 petitions resulted in the opening of an investigations and of those 19 resulted in the application of temporary or permanent remedial measures. Antidumping activity in Brazil is a relatively new phenomena. The early 1990s witnessed a dramatic increase in the number of antidumping cases brought before the Brazilian authorities. Not surprisingly this coincide with the implementation of trade liberalization policies. Seven cases were initiated in Brazil in 1991, another seven in 1992 and 18 in 1993, with favorable determinations of 1, 5 and 5 for the respective years. The most significant increases in antidumping occurred during 1994 and 1996. Argentina led the Latin American countries in the use of antidumping. Mexico and Brazil came second and third respectively. In the consideration of all those cases the respective competition policies agencies had no role, advisory or otherwise. They were total strangers, when indeed they should have been siblings of the antidumping agencies if not soul mates. The increase in antidumping in 1996 to some extent is associated with the postponment of actions to fully implement Uruguay Round

⁶ Recently, Latin American countries had by and large not taken recourse to the balance of payments provision for limiting imports under Article XXVIII (b) of GATT.

⁷ These cases are not reported on Table 2 since we do not have the breakdown by year.

decisions. In 1997 antidumping initiations declined relative to 1996 but remained high compared to the early 1990s.

Table 2: Antidumping Activity in Latin America – Initiations, 1989-97

Country	1989	1990	1991	1992	1993	1994	1995	1996	1997
Argentina							6	42	18
Brazil	2		2	9	4	30	12	1	19
Chile							2	4	2
Colombia						4	1	5	1
Guatemala								1	
Mexico	17	9	14	25	24	23	18	3	5
Peru							4	4	3
Venezuela							1	5	
LAC Total	19	9	16	34	28	57	44	65	48
World Total	118	102	179	234	245	247	160	149	190
(Rest of World)	99	93	160	200	217	190	116	84	142
LAC % of World	16%	8%	10%	15%	11%	23%	28%	44%	25%

Source: Trade Policy Reviews, GATT/WTO, various years, and WTO/GATT reports of the Committee on Antidumping Policies, various years.

Many other countries in the region took recourse to other measures to restrict imports, therefore they did not use antidumping as much as Argentina, Brazil, Mexico and Venezuela. The Andean Group of countries had introduced minimum prices for agricultural imports as had Chile. When import prices fell abroad, there was an automatic trigger mechanism in place that prevented increases in imports. In the Andean Group, some eight agricultural commodities are subject to reference prices, with their domestic price tied to five year moving average price. Moreover, the Andean Group has adopted domestic procurement agreements, which treat competitive agricultural imports as residuals. Also, some countries used the transition provisions of the Multifiber Arrangement to restrict import of textiles. Colombia was one of them. Brazil, for example, raised its agricultural tariffs as high as 100%, as it had bound these tariffs up to that level.

An interesting, albeit not surprising, phenomenon in Latin American countries is the increase in antidumping activity against each other. The most frequent use of antidumping in this respect was between Argentina and Brazil within MERCOSUR. Since many tariffs and QRs have been removed between the two countries with the increase in domestic price disparities arising from relative exchange rate movements, antidumping became a favorite instrument within these two countries. The nominal exchange rate anchor approach of Argentina and Brazil (until the abandoning of that approach by Brazil in mid-1995) led to a spate of antidumping actions (see Table 3). Argentina's antidumping actions dominated the 1996 intra-regional actions. They declined in 1997 as a backlog was cleared. Both MERCOSUR and the Andean Group have common 'normative' antidumping regimes—yet, there was antidumping within each group. Operationally MERCOSUR has not yet adopted any harmonization measures in the area of antidumping and countervailing duties. The intentions are there are efforts are underway. Argentina and Brazil have formalized antidumping and countervailing regulation and Paraguay and Uruguay have not. Similarly NAFTA allows the continued use of antidumping and countervailing duties by members against their free trade partners. This is indeed quite peculiar and paradoxical, and an anomaly among free trade areas in general. For example, neither the European Free Association, the European Union, nor the Australia-New-Zealand Closer Economic Relations Trade Agreement, allow such duties to be levied internally (they do allow the imposition of duties on outside countries). The principle behind free trade arrangements is to integrate markets so that domestic and foreign (those of treaty members) markets are considered one and the same with equal treatment. That allows for no room for antidumping actions. Competition policies should replace antidumping regimes, particularly within a trading block and also externally. If indeed there are anti-competitive actions, and dumping is generically not one of them, competition (antitrust) policies and the corresponding agency is perfectly entitled to oversee and police them. Domestic and supranational (when existing) competition legislation can very appropriately deal with genuinely unfair trade practices and anticompetitive behavior by domestic and foreign industry alike.

Table 3: Intra-LAC Antidumping Activity—Initiations, 1989-97

Country	1989	1990	1991	1992	1993	1994	1995	1996	1997
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Argentina							1	13	2
Brazil	0		2	1	0	1	0	0	3
Chile							1	2	0
Colombia						0	0	0	1
Guatemala								1	
Mexico	0	2	1	7	3	2	2	0	1
Peru							1	2	
Venezuela							1	3	1
LAC Total	0	2	3	8	3	3	6	21	8
Intra-LAC % of LAC Total	0%	67%	20%	24%	11%	5%	14%	32%	17%

Source: Trade Policy Reviews, GATT/WTO, various years.

In addition to the adoption of GATT/WTO rules, many countries in the region established new trade policy making institutions that reflected national interest in trade policy making, moving away from the earlier institutions that were subject to more sectoral interests.⁸ Antidumping came under these institutions. Argentina established a National Trade Commission in 1994 charged with the responsibility of advising the Government on trade policy making including the recourse to exceptional protection measures such as antidumping. Brazil closed down its highly protectionist institution CACEX and made trade policy making more responsive to national interests by creating a more neutral institution, DEXEX. Bolivia has the Ministry of Export and Import Competition which decides on antidumping policies advised by a technical secretariat comprising staff from the Ministry of Finance, the Central Bank and representatives of private enterprises. Chile also established National Trade Commission in 1986 and which has been a much emulated model by other countries in the region. Colombia brought trade policy making under the aegis of the Ministry of Foreign trade and established stringent criteria for antidumping, safeguards and countervailing. Costa Rica, on the other hand, uses the Central American Common Market rules for deciding antidumping actions. Mexico also reformed its trade policy making institutions. Antidumping is administered by SECOFI with consultation with the Commission for Tariffs and Foreign Trade Controls. Despite its membership in NAFTA, Mexico

⁸ Sarath Rajapatirana "Post Trade Liberalization Policy and Institutional Challenges in Latin America and the Caribbean." In *Trade Policies in Latin American and the Caribbean: Priorities, Progress, and Prospects*. International Center for Economic Growth, San Francisco, 1997.

like the other partners of NAFTA retains the right to conduct its own antidumping, countervailing and safeguard practices. Peru administers antidumping with its Dumping and Subsidies Commission, now under INDECOPI, and under the jurisdiction of the Minister of Industry and supported by a technical staff. It is unique for considering both antidumping and domestic competition cases by the same body. In Uruguay, antidumping policy making is the responsibility of the Application Commission, which advises the Ministry of Economy on antidumping actions. Venezuela administers antidumping through the Commission on Antidumping and Subsidies, an autonomous entity within the Ministry of Development.⁹

All these institutions follow a pretty standard pattern for proceedings with antidumping inquiries. These are transparent processes, all the applications are gazetted. Various time periods are stipulated for notification, for making decisions on the applications and communication of decisions on antidumping to the applicants and the public at large. Thus compared to the past, the region has adopted well set and open processes. This is not to say that the processes have been impeccable. It is most interesting to note that the two countries that seemed to have used antidumping more sparingly than any others in the region are Bolivia and Chile. They are also the more open trade regimes in the region, with low protection (i.e. 11% uniform tariffs in Chile and 5% and 10% tariffs in Bolivia).

The pattern of antidumping measures initiated in the region is revealing for their commodity composition. Textiles and garments, steel, some agricultural products (despite high bound tariffs in the region for agriculture), chemicals, plastic products and fertilizer have been subject to most antidumping actions. Obviously, the presence of domestic capacity is the overriding reason for the initiation of antidumping actions. In most countries there is a cut-off of at least 25% of the production capacity must support an antidumping application. This is not hard to find, as a successful antidumping action is a guarantee for profits or the avoidance of losses.

⁹ This paragraph draws heavily on the Trade Policy Review documents of GATT/WTO for the countries mentioned.

Also, the often stated argument that dumping practices damage domestic industries is also questionable. There is a widespread belief that unfair trade practices, including sales of goods at less than fair value (dumping), and subsidization of industry by foreign governments, injure domestic industries, drive firms out of business, and create unemployment. This belief has rallied the private sector and governments to amend their laws against dumping and subsidized imports, facilitating the relief of injured firms. Despite this passionately held belief it is interesting that little effort has been placed on evaluating the consequences of such actions. The central premise, that unfairly traded imports have been a serious problem, has remained largely unexamined. There is a recent analysis (Morkre and Kelly, 1994), of the effects of those actions on US domestic industries from 1980-88, between two important changes in the law: the Trade Act of 1979, which implemented the agreements reached in the Tokyo Round and the Trade Act of 1988. The Trade Act of 1979 introduced an injury test for most subsidized imports (previously, only duty free imports were given an injury test) and made substantial changes in procedures for the administration of the law, inter alia, strict time limits for the various phases, and instructed the President to submit a reorganization plan to improve enforcement of the unfair import laws. The question posed in that study was not if there was injury, but rather the magnitude of the injury.

The US International Trade Commission made decisions on 221 cases. There was very good information on 179 of those cases to make an assessment of the magnitude of the injury. Of those 179 cases, only 53, or less than one third, induced a loss in domestic revenues as the result of unfairly traded imports that could be greater than 5%. Of those, only 21 cases involved a loss in revenue that could be greater than 10%. Moreover, the study went to great lengths to overstate the cases in favor of injury. Therefore, the reported injury levels are an upper bound. Industries are diverse, from agriculture and consumer goods to raw materials and industrial products and in the analysis, the benefits consumer derived from purchasing at lower prices was not considered.

V. Competition Policies in Latin America

While antidumping rules have been enthusiastically adopted by Latin American countries, competition policies are barely making their appearance, and rarely are being taken seriously. There lies the problem. Competition policies in Latin America and Caribbean are still in their

infancy in the region, both in terms of countries having passed modern effective legislation and particularly in the extent of enforcement, even though many countries had laws going back a few decades. A selective list of the competition laws that were passed in the region includes: Argentina (1919, 1946, and 1980), Brazil (1962, 1986, and 1992), Chile (1959 and 1973), Colombia (1963 and 1992), Mexico (1993) Jamaica (1992), Peru (1991, 1996), and Venezuela (1991).¹⁰ Yet its enforcement has been mostly absent. Often there was and there is not a specialized agency with the appropriate jurisdiction, and even when there is one, the budget and resources are minimal and inadequate and dependent on the executive branch largesse, and thus subject to political capture.. Many analysts have observed the lack of convergence between antidumping and competition policies in well known models of trade and antitrust.¹¹ Thus there is no surprise that there is a lack of convergence between trade and competition policy in Latin America in practice.¹² Peru, as a result of having a single institution with jurisdiction over both antidumping and competition policies, is the closest case to exhibit some convergence.

Regarding competition policies, there is much still to be accomplished in Latin America. Only seven countries have enacted comprehensive anti-trust legislation, Chile, Venezuela, Peru, Mexico, Colombia, Jamaica and Brazil. And most of this legislation has been enacted only since 1991. Therefore, there is little record to evaluate. Yet, some of the positive results of competition policies in Latin America are already apparent. In Venezuela it has had a significant impact in breaking and deterring existing price agreements among competitors, and officially sanctioned cartels. In Chile a main focus has been the successful breaking of vertical restraints and collusive practices, while Mexico has mostly focused on merger policy. Peru has successfully facilitated entry and exit in economic activity and deterred distributional restraints and misleading informational practices. Most of the focus and resources in Peru has been on consumer protection issues, only recently it has began to address more mainstream and

¹⁰ See Jatar, Ana Julia, "Competition Policy in Latin America: The Promotion of Social Change" Inter-American Dialogue, January 1995 (mimeo).

¹¹ Levinsohn, James "Competition Policy and International Trade." He remarks "While trade theorist have borrowed heavily from the theory of industrial organization, they seem to have ignored the existence of competition policy when investigating trade policy." NBER Working Paper No: 4972, December 1994.

¹² Guasch, Luis and Sarath Rajapatirana "The Interface of Trade, Investment and Competition Policies: Issues in Challenges for Latin America." Policy Research Working Paper No: 1393, World Bank, December 1994.

substantive antitrust cases with two favorable decisions on breaking the wheat-bread and chicken producers cartels.

The Brazil caseload has focused mostly on concentration issues and particularly on mergers and acquisitions. Brazil's competition law provides comprehensive coverage of the major issues including an extraterritorial "effects" test, private rights of action, use of consent decrees, liability for individuals as well as corporations, which permits the competition agencies to examine public as well as private actions including privatizations transactions. The initial implementation of the 1994 law proved troublesome due partly to lack of resources of the main agency as well as unhappiness with some of its decisions by the private sector. Argentina has had a modern draft law sitting in Congress since 1992, and there is no indication as of yet of any progress in its passing. Paraguay, El Salvador and Ecuador are in the midst of preparing draft legislation on the subject. Other countries have yet to consider such legislation.

Common issues in most of the Latin American and Caribbean countries are scarcity of resources, lack of independence of the enforcing agencies and little experience and human capital to properly enforce the legislation (Guasch, 1994). The timing and delays on the passage of modern antitrust legislation, within the reform agenda of Latin American countries and the limited resources assigned to the Antitrust agencies in Latin America are perhaps an indication of the relative importance and low priority, that (inappropriately) governments give to competition policies and to its enforcement. For example, the Colombian and Peruvian agencies dealing with antitrust have less than six professionals. Lawyers rather than economists dominate the operational staff of the agencies. Budgets are very thin and largely dependent on the executive, rather than having their own independent allocation by law as it should. Otherwise the autonomy of the Antitrust agency is questionable and can easily be subject to government pressure and capture.

There is often a lack of understanding and support by the public and a distrust by the business community on the merits of competition policy, mostly coming from a lack of tradition on the subject in the Region and from a concern of government intentions that the legislation

could be used for political and not economic purposes. This is beginning to change but a very slow pace.

All Latin American countries except Peru, perhaps following the US and European Union model, have kept the agencies dealing with competition and antidumping, separate a practice that is, at least normatively, questionable. Antitrust agencies should have some form of jurisdiction over antidumping cases. After all the objective of both are the same, the overseeing, deterrence and punishments of anti-competitive practices. If dumping practices are deemed anti-competitive, and that is a difficult case to argue, they should be treated by the competition agency. Antidumping laws define the practice of dumping in terms of predation or price discrimination (both covered by competition policies). They do not require that predatory intent be demonstrated, and they only demand that injury be shown to a particular industry rather than to competition or welfare in general. In so doing the laws can target what can essentially be rational competitive behavior which does not necessarily decrease (long term) welfare. In consequence, the definition of dumping itself allows for situations in which antidumping duties may be inappropriate. When dumping is merely an international extension of price discrimination and the foreign exporter sells exports at a lower price abroad than in the exporting country (as a result of having more market power at home), but above cost, this would be considered dumping. However, although import competitors may be hurt, the distortion that needs to be addressed is the higher price at the home of the exporter, and the lower price would be a net benefit to the importing country via an increase in consumer welfare.

VI. Conclusions: Integration of Antidumping and Competition Policies

Latin American countries undertook significant trade reforms in the mid-eighties to the nineties. As a result, their economies are more open than any other time in the post World War II period. In the 1990s, as the Uruguay Round negotiations were taking place, many Latin American countries joined the GATT and others who had been members earlier, but had remained inactive, adopted GATT rules and codes, including antidumping rules. With the Uruguay Round, these countries took on the complete obligations of membership including antidumping rules.

Latin American countries refashioned their trade making institutions or created new ones to reflect more the national interest rather than have trade policy making dominated by a sectoral interest. Similarly, antidumping procedures adopted were GATT consistent and are being adopted to the new rules governing antidumping that have come into being with the Uruguay Round.

With the trade liberalizations, adopting of GATT/WTO rules and adoption of common standards for antidumping with regional agreements, such as within the Andean Group and MERCOSUR, Latin American countries have used antidumping more than anytime in the past. What is more, antidumping actions within the regional groupings have increased. The increase in antidumping parallels that of developed countries that also increased antidumping as their trade regimes were liberalized. In this sense, Latin American Countries are imitating the developed countries.

Antidumping is by and large anti-competitive. There is little economic argument that can support the practice of antidumping. There are many deficiencies in the use of antidumping, ranging from its conceptual interpretation, the arbitrariness in the calculation of dumping margins to the neglect of a full account of costs and benefits. National welfare is generically reduced due the use of antidumping. In consequence it is imperative that it be reformed if not eliminated, in favor of safeguards and competition policies. Safeguards are a much better instrument to deal with import threats. They cost less in terms of national welfare. But they have a higher threshold of proof. Consequently, safeguards were much less used in developed countries and at present even less used in Latin America. The Uruguay Round agreements did not increase the attractiveness of safeguards relative to antidumping.

While antidumping has proliferated in the Latin America region, the use of competition policy has been limited. This is not surprising, since there has not been even normatively a close affinity established between trade policy measures and competition policy. In practice they have been total strangers when they should have been soul mates. Again, this should not be totally surprising, since they have different constituencies, and one more vocal than the other. In “dumping” events, the initial effect is often the loss of market share of domestic competing firms with potential associated job losses. This effect is quite concentrated and visible and the affected

labor and firms are quite vocal and the pressures and lobbying to punish the dumping firm strong. On the other hand, the immediate benefits, lower consumer prices and greater selection of products, greater market discipline, are widespread and the individual impact (benefit) not as significant-and thus a less vocal constituency-even though the aggregate net welfare gain is quite large. This asymmetry, tends to induce governments to be more sensitive to industry pressures and to supports the claims. The long term benefits discounted by current interest rates could be positive. Yet, the short term costs may be concentrated in time and in some sectors. In such a case protection would continue and competition remain limited.

Compared to antidumping rules and practice Latin America has only a few competition policy regimes. Competition had been limited in the region due to past policies and the earlier ideological commitment that led to state monopolies. Latin America has been re-evaluating and changing the statistic model and competition policy is beginning to take hold. As competitive structures are put into place they have an onerous role to play to be able to act as the antidote against trade protection that manifests itself in the form of antidumping and other competition reducing measures. The lack of enthusiasm of many Latin American countries in adopting and embracing competition policies should be a source of concern. However, recent measures taken by a number of countries provides for some reassurance that the tide is turning and that most countries are become aware of the relevance of having integrated and complementary trade and competition policies, notwithstanding the pressures and temptations for reversals.

Further evidence of the strangeness between competition policies and antidumping is the set up of the hemispheric working groups (HWGs), which serve as the focal point of the FTAA process. Seven groups were created at the Denver Trade Ministerial meeting in June 1995. One of them was on subsidies, antidumping and countervailing duties. There was no mention of coordination with competition policies. Four additional HWGs were established at a subsequent meeting in Cartagena, Colombia in March 1996. One of them was on competition policies. Yet they are designed as separate-as strangers-with no mandate to coordinate or integrate, as they normatively should, recommendations. A commission to integrate and make the recommendations

compatible should be established pointing for the establishment of a single agency with jurisdiction over both matters. A committee on competition policy was created in the Singapore ministerial meeting of the WTO in December 1997. In the Fourth Trade Ministerial meeting in San Jose, Costa Rica in March 1998, a competitor policy negotiating group was created chaired by Peru. Another negotiating group for antidumping, subsidies and countervailing duties was created under the chairmanship of Brazil with apparently no connection between the two negotiating groups.

Further fine-tuning and refining of antidumping policy is not the answer to prevent the slippage into protection with the use of this instrument. The antidote is competition policies. The current efforts should be directed toward the implementation of comprehensive competition policies and credible enforcement agencies. They should also be aimed toward the phasing out of most of the trade policy instruments, such as antidumping, countervailing duties and safeguards and their replacement by a broader application of competition policies and of extraterritorial jurisdiction.¹³ Competition policies, when broadly used can effectively substitute for most trade instruments. The competitive merits, if any, of any antidumping request can and should be evaluated by the competition (Antitrust) agency, using the same standards and framework of competition policies, and not discriminate against the source from which competition arises, whether it be domestically or from abroad

In this sense competition policy needs to be brought into to the WTO agenda as the next area for action on the multilateral front as resolved in the Singapore Ministerial meeting in December 1997. Meanwhile, regional trading arrangements can adopt common competition policies and use them instead of antidumping. Some countries, such as Colombia has on its own introduced a higher threshold for antidumping and safeguard actions, but revised them to conform to the lower WTO standards. That kind of raising of standards for antidumping could be an interim measure. The real instrument to promote competition and to prevent antidumping is the

¹³ An innovative and welcomed step in that direction is the institutional design of Peru's competition enforcement agency, INDECOPI. It has been given jurisdiction to enforce both trade and competition policies.

adoption of competition policy. Such a proposal should be presented in the context of the Free Trade Area of the Americas.

A precedent for using competition policy in lieu of antidumping exists within the European Union. By common agreement, EU members do not impose antidumping actions against one another, as the Latin Americans do within their regional trading arrangements. Instead, EU has a common competition policy which allows for the consideration of both benefits and costs of actions to limit imports, restrain mergers and acquisitions, price agreements, and other measures that could thwart competition within the union. A similar arrangement exists between Australia and New Zealand. To facilitate the process, efforts should continue toward the harmonization of legislation and toward its enforcement across countries and toward the creation of binding supranational enforcement institutions.

Another proposal to prevent the abuse of antidumping is that with competition policies the exporter cannot extract monopoly rents in the domestic market, which could be the basis for anticompetitive behavior in the export market. Competition policy would also help to make antidumping policy less harmful by enlisting the cooperation of the competition authorities of the exporting country to investigate the domestic market, while the antidumping and competition authority of the importing country can conduct an inquiry to determine whether dumping has taken place. This way there is a balancing of interests of both exporting and importing countries so that the recourse to antidumping could be limited.¹⁴

Also, safeguard rules should be improved so that they become the more attractive instrument than antidumping. That could be achieved by permitting a lower threshold for safeguards than at present, one way is to reduce the use of safeguard to one year, as Colombia has done and to indicate actual injury than the threat of injury. Conversely, antidumping thresholds could be raised either by letting a wider margin for antidumping actions by raising the de minimis provision from say 2% as at present to 5% and raising the de minimis share of the exporting country

¹⁴ See Hoeckman, Bernard M. and Petros C. Mavroidis "Antitrust Based Remedies and Dumping in International Trade," Center for Economic Policy Research, Discussion Paper 1010, August 1994.

from 3% to say 5-6% and substituting a more reasonable test to measure domestic costs based not on average costs but marginal costs.

Unfortunately, retaliation has been an antidote to the use of antidumping. However, retaliation as an antidote works when large countries threaten small countries. Thus it is not an option available to all countries. Also retaliation could lead to further proliferation of antidumping.

Ultimately, the use of exceptional protection is a matter of commitment to liberal trade and competition by a country. Those countries that are committed to these ideals have institutions that encode these ideals and they resist domestic producers from attempting to use exceptional protection to raise their profits by reducing competition. Only through the eradication of antidumping policies and the transferring of jurisdiction to competition policies agencies, previous enactment of effective antitrust legislation and its proper enforcement will competition policies and antidumping become soul mates. Otherwise they will remain total strangers at a significant welfare cost to all countries involved.

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